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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

T.M. VANDELEUR LEIGH, Plaintiff and Respondent, v. STEPHENS INSTITUTE, INC., Defendant and Appellant.	H043942 (Santa Cruz County Super. Ct. No. CV181380)

Artist T.M. Vandeleur Leigh, also known as Vanda Lavar (Lavar) enrolled in the Master of Fine Arts (MFA) program operated by defendant Stephens Institute, Inc., doing business as Academy of Art University (the University). Lavar filed suit after the University failed to address her grievances with the program and refused to refund enrollment fees. During litigation, the University sought to obtain Lavar's consent to arbitrate the dispute under the arbitration clause of the enrollment agreement that Lavar signed as a student. At one point, the University refused to proceed with Lavar's deposition on the date it was noticed, citing its decision to bring a petition to compel arbitration. Lavar moved for monetary sanctions for this and other alleged discovery abuses. The University denied any abusive tactics and, separately, filed a petition to enforce the arbitration agreement and stay proceedings. The trial court in both instances found in favor of Lavar.

On appeal, the University challenges (1) the order granting a monetary sanction, and (2) the order denying the petition for arbitration. For the reasons explained below, we shall affirm.

I. BACKGROUND

Lavar is a professional artist living in Santa Cruz County. In 2009, she was accepted to the MFA program at the University. She completed coursework at the University from September 2009 to May 2014 while continuing her commercial work as an artist. Lavar was three courses short of completing the requirements for her MFA degree when she filed this lawsuit in propria persona in March 2015. Before filing suit, Lavar tried to resolve her dispute with the University by following internal grievance procedures and contacting the county district attorney's consumer fraud mediation services. Lavar later found counsel who agreed to represent her pro bono.

The operative complaint asserts eight causes of action.[1] Each relates to allegations of deceitful conduct and false representations by the University and its faculty. Among these, Lavar claims the University and "Doe" defendants intentionally misrepresented the school's institutional history, the qualifications and credentials of the founder and various teaching staff, the curriculum and faculty review processes of the degree program, and the ability of the teaching staff to support Lavar in her thesis work.

A. UNIVERSITY ENROLLMENT AGREEMENT

Lavar began coursework at the University in 2009. In 2011, she executed by electronic signature a student enrollment contract entitled " 'Academy of Art University Enrollment Agreement.' " The agreement states that it "is a legally binding instrument when signed" by the student, who acknowledges having been given "a reasonable time to

[1] These are (1) fraud, (2) negligent misrepresentation, (3) negligence, (4) negligent hiring/supervision, (5) breach of implied contract, (6) breach of implied covenant of good faith and fair dealing, (7) violation of unfair business practices, and (8) violation of consumer legal remedies act.

read and understand" the agreement, including a "written statement of the refund policy . . . ."

Paragraph 6, titled "ADDITIONAL TERMS" contains the following language: "**h. Arbitration:** Any controversy or claim arising out of or relating to this agreement . . . , whether such dispute gives rise to or may give rise to a cause of action in contract, tort, . . . or based on any other theory of statute, shall be submitted exclusively to final and binding arbitration in accordance with the laws of the State of California upon a claim submitted in writing to the other Party to this agreement. . . . A neutral arbitrator shall be jointly chosen by both parties from a list of arbitrators supplied by the American Arbitration Association or from any other source mutually agreed upon by the parties. . . . The duly rendered decision of an arbitrator, including determination of the amount of damages suffered, shall be exclusive, final and binding on both parties."

Lavar accessed and electronically signed the agreement through the digital "Student Self-Service" portal used by students during the matriculation and course registration process. According to the University, when the agreement is open in the web-page format, students may scroll through the text to reach the end of the document, which they must do in order to click either the "I Agree" box to accept the terms of the agreement, or the "Return" box if they do not accept the agreement terms. But on Lavar's computer screen, the terms below the signature line were "not visible or apparent . . . ." Based on the location of the signature line in the middle of the agreement, Lavar "was led to believe all terms of the agreement were above. [She] did not see the arbitration clause before [she] signed the agreement."

B. PROCEDURAL HISTORY LEADING TO MONETARY SANCTIONS AND DENIAL OF PETITION TO COMPEL ARBITRATION

There is a stark contrast between how each side portrays the conduct of the litigation in this case. Having combed the record, we attempt in this summary to outline

the sequence of relevant events, drawn primarily from the declarations and correspondence of counsel submitted in the parties' motion and opposition papers.

In March 2015, Lavar filed her initial complaint without the aid of counsel, followed shortly after by a first amended complaint. The University filed an answer and served form interrogatories and a request for production of documents. In July 2015, Lavar retained counsel who agreed to represent her pro bono. The trial court set the case for jury trial to begin on June 6, 2016.

In a letter dated September 15, 2015 and transmitted by e-mail on the morning of September 21, the University informed Lavar that her deposition, which was noticed for September 22, would be rescheduled to the next available date. Lavar asserted the "last minute" cancellation of the deposition as one of several bases for a December 2015 motion to compel and for sanctions, which she later withdrew as discussed further below.

In November 2015, the University produced documents in response to a request for production, including a copy of the enrollment agreement signed by Lavar.

In a letter accompanying the production, dated November 4, 2015, the University highlighted the arbitration clause in the enrollment agreement, which it stated "provides for binding private arbitration as the exclusive remedy for either party . . . ." The letter advised Lavar that the University was considering a motion to compel arbitration but first wished to ascertain whether she "would agree upon your reading of the Enrollment Agreement, that the action properly belongs in arbitration, not court." It asked for a response within two days.

Lavar responded in a letter dated November 23, 2015, that she intended to file an amended complaint "within the next 10 business days" and "[s]o, at this time, we do not believe private binding arbitration, based on the contract, is appropriate." Lavar also complained of "serious problems" with the University's conduct, citing the cancellation of the September 22 deposition and what Lavar deemed was a disorganized and repetitive "dump" of "non-responsive replies" to a request for production of documents.

The filing of a second amended complaint did not occur in the referenced time frame in November 2015.

In December 2015, Lavar reportedly sought $12,592 in sanctions against the University for dilatory and abusive discovery tactics, but later withdrew the motion.[2] In these discussions, the University's counsel again raised the arbitration issue. Lavar's counsel stated that he would discuss it with his client. An e-mail to the University on January 8, 2016, reaffirmed that "I look forward to letting you know, early next week, how my client wishes to proceed regarding the private arbitration clause and the amended complaint." This pattern of communications continued through the month of January.

Meanwhile, the University took Lavar's deposition on February 3, 2016,[3] based on information that Lavar would be unavailable until trial due to medical surgery. Also in February, Lavar moved for leave to amend the complaint, but took the motion off

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[2] The University asserts in its reply brief that the 2015 motion "does not exist"—a point the University's counsel repeated at the oral argument before this court, suggesting that maybe there was a motion but it was never served.

The existence of the 2015 motion is not determinative of any issue on appeal. But it is one of several examples in which the parties present the record of litigation differently, and this court is unable to ascertain from the available record what transpired. We are troubled by the discrepancies. In this instance, the record contains several references to the 2015 sanctions motion, including in the sworn declaration of Lavar's counsel in support of the underlying motion for sanctions, which describes the December 2015 motion and states that he agreed to withdraw it "to expedite discovery and a trial on the merits," as well as in an e-mail dated January 8, 2016, in which Lavar's counsel asks the University's counsel for "a template document or a few sentences that are fair for a withdrawal, without prejudice, of the motion to compel" which he "will try to have . . . filed Monday morning or Tuesday morning." We decline to impute dishonesty to the sworn statements of counsel, even though we recognize the self-serving nature of such declarations. "Ordinarily, discovery motions are resolved by declaration." (*Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1436 (*United States Swimming*), citing Cal. Rules of Court, rule 3.1306(a).)

[3] This is another example of a discrepancy in the parties' accounts. Lavar maintains that she submitted to 14 hours of deposition on February 3 and 4, 2016, while the University references only February 3, 2016 as the date of the deposition.

calendar because there was insufficient time before the noticed hearing date. In an e-mail dated February 9, 2016, the University proposed a solution "to reduce time and motions" by which it could schedule arbitration, to be based upon the proposed second amended complaint and paid for by the defense, and to take place after plaintiff's person most qualified (PMQ) deposition of the University. Plaintiff's counsel responded the next day stating that his client was "about to go into surgery" and that he "hope[d] to review these matters" with her in a few weeks. The University followed up again by e-mail dated March 24, 2016, asking for a response to its demand for arbitration and whether plaintiff intended to seek leave to file an amended pleading.

Lavar filed her motion for leave to file a second amended complaint on April 15, 2016. In its response memorandum and at the hearing on the motion, the University stated that it did not object to the filing of the second amended complaint so long as the University retained the right to petition to compel arbitration as its responsive pleading. On May 5, 2016, the trial court granted Lavar leave to file the second amended complaint; vacated the June 2016 trial date and set a new trial date of October 24, 2016; and ordered the University to file a responsive pleading "within 30 days of the filing of the Second Amended Complaint, which may include a motion to compel arbitration . . . ." Pursuant to that order, Lavar filed the operative verified second amended complaint for damages (operative complaint) on June 1, 2016.

On May 23, 2016, the University served a notice of continued deposition of Lavar and request for production, which after disagreement between counsel about the date was ultimately set for June 8, 2016. According to the University, the continued deposition was necessary because Lavar had not produced all of the responsive documents at her February deposition.

On June 8, 2016, upon arriving at the site noticed for Lavar's deposition, counsel for the University informed those present that he would not proceed. He explained that he had "only realized that the deposition should not proceed while driving over" and

apologized for failing to give earlier notice. He offered to reimburse the travel expenses of Lavar's counsel and declined to accept the documents that Lavar had brought to the deposition in response to the request for production.

On June 14, 2016, Lavar's counsel sent an e-mail demand for $2,189.50 in fees and expenses related to the cancelled deposition. The University responded on June 20, that "[r]egarding your . . . demand for reimbursement of fees and costs: we will be sending a check to you later this week. We are hopeful that this payment will fully resolve the issues." On June 24, the University mailed a check to in the amount of $1,950 "for the fees related to the scheduling changes that occurred on June 8, 2016." That same day, Lavar's counsel informed the University that "[a]s a professional courtesy, I'm emailing to suggest that you don't waste further time or resources of either party with communications on this matter until we contact you about it next week." A few days later, on June 29, Lavar filed a motion for sanctions pursuant to Code of Civil Procedure[4] section 2025.430 for the cancelled deposition "and other abuses."

Separately, in accordance with the trial court's trial setting order, the University filed its responsive pleading to the operative complaint on June 29, 2016, seeking to enforce the arbitration clause and stay the action pending arbitration.

The trial court held separate proceedings, presided over by different judges, on the motion for sanctions and petition to compel arbitration.

On August 4, 2016, the trial court granted Lavar's motion for sanctions in the amount of $7,528.65.

On August 30, 2016, the trial court denied the University's petition for an order to arbitrate and for a stay of action pending arbitration.

The University timely appealed from both orders.

[4] Unspecified statutory references are to the Code of Civil Procedure.

II. DISCUSSION

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A MONETARY SANCTION

Section 2025.430 directs the trial court to "impose a monetary sanction under Chapter 7" of the Civil Discovery Act when "the party giving notice of a deposition fails to attend or proceed with it . . . ." An exception exists if the court finds the offending party "acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (§ 2025.430.)

An order awarding a monetary sanction of more than $5,000 is directly appealable. (§ 904.1, subd. (a)(11).) In reviewing the sanction order, we will uphold the trial court's determination absent an abuse of discretion. (*Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, 191 (*Howell*).) Where the decision to impose a sanction rests on factual determinations, we review the record for substantial evidence to support those determinations. (*Id*. at p. 192; *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 430 [reviewing court first determines "whether substantial evidence supports the factual basis on which the trial court acted," then determines whether the order to impose sanctions was an abuse of discretion "in light of those facts"].) We draw all reasonable inferences in favor of the trial court's ruling. (*Howell*, *supra*, at p. 192.)

1. Cancellation of the Deposition Warranted a Monetary Sanction

There is no dispute that the University noticed Lavar's deposition for June 8, 2016, then failed to proceed with the deposition that day. This is a textbook example of conduct addressed by section 2025.430: "If the party giving notice of a deposition fails to attend or proceed with it, the court shall impose a monetary sanction . . . against that party, or the attorney for that party, or both, and in favor of any party attending . . . ." Accordingly, under the statutory scheme, a monetary sanction in an amount incurred due to the offending conduct, including attorney fees, must be imposed unless the trial court finds "that the one subject to the sanction acted with substantial justification or that other

circumstances make the imposition of the sanction unjust." (§§ 2023.030, subd. (a), 2025.430; *Howell*, *supra*, 18 Cal.App.5th at p. 191.)

The University admits its blunder from the outset. But it contends the sanction award was improper because the trial court appears to have based its decision *not* on the cancelled deposition, but on its impression of uncivil communications and misconduct between the parties. It also contends that the evidence in the record meets both statutory exceptions. First, it argues that it had substantial justification to not proceed with the deposition because the court had ruled that it could petition for arbitration in its response to the second amended complaint. Also, it argues that the imposition of a sanction was unjust considering its counsel immediately acknowledged his mistake and offered to reimburse Lavar's counsel's expenses. The University faults Lavar for incurring additional fees and costs by proceeding with the sanctions motion despite having received the University's check to pay the expenses claimed by her two attorneys.

We credit the University's counsel for acknowledging the failure to cancel the deposition sooner and for offering to pay the other side's expenses. We also recognize that in the University's view, the judge presiding over the sanctions motion gave short shrift to any nuanced deliberation of the underlying facts. But none of this changes the University's abrupt cancellation and its consequences under the statute.

The University served notice on May 23, 2016, of the continued deposition of Lavar, which it states was necessary because she previously failed to respond completely to the University's request for production. At that time, the University knew of the impending deadline to file its arbitration petition because the trial court had issued its May 5, 2016 order directing the University to file its responsive pleading "which may include a motion to compel arbitration" within 30 days of the filing of the second amended complaint. Plaintiff filed the operative (second amended) complaint on June 1, 2016. With the deadline to file a petition for arbitration firmly set, counsel for the University—who had avowed for many months to enforce the arbitration agreement—

had ample time before June 8, 2016, to weigh the tactical implications of proceeding with the continued deposition. There is also some evidence that the cancellation was not just the unfortunate result of an isolated oversight by the University's counsel but the culmination of what the judge at the hearing called "a mess of procedural unpleasantness."[5] The cancellation of Lavar's deposition on June 8, 2016 was a proper basis for sanctions under section 2025.430. We therefore reject the notion that the trial court imposed sanctions based on unsubstantiated "past abuses" or a misguided impression of uncivil conduct.

2. The Trial Court Acted Within its Discretion in Rejecting Application of a Statutory Exception to the Monetary Sanction

Nor do we find that either exception under section 2025.430 applies. The University argues that it had good reason or "substantial justification" (§ 2025.430) to cancel the deposition due to its impending petition to compel arbitration. The University offers no case authority, and we have found none, interpreting the "substantial justification" exception under section 2025.430. But courts have considered usage of the same phrase in other provisions of the Civil Discovery Act, including section 2023.030, subdivision (a),[6] which applies equally here.

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[5] In its reply brief on appeal, the University criticizes Lavar for making numerous assertions and statements of "fact" in her respondent's brief that are not supported by citation to the record. We do not rely on assertions that lack a proper record citation or on argument that has no foundation in the record. At the same time, we need not ignore facts stated in counsel's sworn declarations which are not contradicted in the record before us. (See *United States Swimming, supra,* 200 Cal.App.4th at p. 1436 [noting the use of declarations in resolving discovery motions].) Among these are that the University insisted on the continued deposition despite having deposed Lavar for 14 hours over two days in February; the University did not respond to requests for reciprocity in the conditions of deposition and delayed for months to provide verifications to discovery responses; and the University rejected proposed alternative dates for Lavar's deposition and pressured her to accept the June 8 date by threatening a motion to compel.

[6] "If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with (continued)

In *United States Swimming, supra,* 200 Cal.App.4th 1424, the trial court imposed a monetary sanction on the defendant, United States Swimming, after determining that it acted without substantial justification in opposing a motion to compel. (*Id*. at pp. 1433-1435.) The appellate court looked to "a variety of similar contexts" and held that " 'substantial justification' " means a justification that is "clearly reasonable because it is well grounded in both law and fact." (*Id*. at p. 1434.) The court affirmed the sanction award, finding the defendant's position unreasonably relied on "a strained and overinclusive interpretation of" the trial court's protective order which did not meet the standard for substantial justification. (*Id*. at p. 1439.)

Courts tasked with reviewing monetary sanctions for discovery abuses have applied *United States Swimming*'s definition of substantial justification. (See, e.g., *Diepenbrock v. Brown* (2012) 208 Cal.App.4th 743, 747-748 [reversing sanction against the plaintiff whose invocation of marital privilege was unsuccessful, but not unreasonable in that it was based upon available authority and pertained to an area of unsettled law]; *Padron v. Watchtower Bible & Tract Society of New York, Inc*. (2017) 16 Cal.App.5th 1246, 1269-1270 [affirming sanction against the defendant organization whose refusal to produce documents responsive to discovery request was based on privacy arguments that were previously considered and rejected by a discovery referee and the trial court].)

The University in this case fails to demonstrate that its last-minute cancellation of Lavar's deposition was "well grounded in both law and fact." (*United States Swimming, supra,* 200 Cal.App.4th at p. 1434.) Even if the University had legal justification to refrain from pursuing additional discovery once it decided to enforce arbitration between the parties, the record described above shows that the University had no defensible reason to wait until the day of the deposition to cancel.

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substantial justification or that other circumstances make the imposition of the sanction unjust." (§ 2023.030, subd. (a).)

The University makes a stronger case under the second exception wherein "other circumstances make the imposition of the sanction unjust" (§ 2025.430). The crux of this argument is that Lavar inappropriately filed for sanctions despite knowing the University had agreed to compensate fees and costs and, in fact, had already sent a check.

There is merit to the University's position. Notably, the motion for sanctions omits key details about the University's efforts to pay and, even more troubling, fails to apprise the trial court of the fact that Lavar's counsel had received a reimbursement check for $1,950 of the $2,189.50 initially requested.[7] At the same time, the record shows that Lavar's counsel incurred attorney fees to prepare the motion for sanctions only after the University failed to respond in the time requested.

A short chronology is necessary to assess whether the court abused its discretion in imposing a sanction notwithstanding the University's payment to plaintiff.

The cancelled deposition occurred on June 8, 2016. The University's counsel "profusely apologized" and "immediately offered to reimburse" Lavar's attending counsel, Bruce Wong, for his travel expenses. That same day, Wong submitted an invoice for $276.45 for hotel and travel. The University's counsel issued the check, but before it was mailed, Lavar's lead counsel who had not attended the deposition, Noel Lawrence, sent an additional demand for a total of $2,189.50 in fees and expenses, including for time spent negotiating the deposition date and preparing Wong to take the deposition. The June 14, 2016, prolix e-mail demands that the University "promptly pay, or show agreement to pay" the referenced amount "by Thursday 2pm (appx 48 hours)."

[7] The declaration of Lavar's counsel, Noel Lawrence, attaches only a few of the referenced communications with opposing counsel and fails to inform the trial court of the substance of the responses that he received from the University. Evidence of the relevant exchanges between counsel, however, is supplied by the University in its opposition papers to the motion for sanctions.

Lawrence received no response from the University and so began drafting the motion for sanctions three days later on June 17, 2016. He later heard from the University's counsel, who he claims failed "to even attempt to address the main issue (here, the amount owed for last minute cancellation), and instead trie[d] to distract . . . with emails on minor related issues."

These e-mails from the University's counsel were sent on June 20 and 21, 2016. The first e-mail states, "Regarding your below demand for reimbursement of fees and costs: we will be sending a check to you later this week. We are hopeful that this payment will fully resolve the issues." The next day's e-mail asks where to send the check and states that it will be sent "by 3:00 p.m. this Friday, June 24." On June 24, Lawrence responded by e-mail to opposing counsel, suggesting "[a]s a professional courtesy" that "you don't waste further time or resources . . . with communications on this matter until we contact you about it next week." The University mailed the reimbursement check for $1,950 on June 24, 2016. The motion for sanctions was served and filed on June 29, 2016.

At the hearing, the University argued that the motion was filed without any need and that its supporting declaration was dated 10 days early "so as to not tell the Court that we've already paid the fees." After asking what happened to the $1,950 check—which Lavar explained was simply being held—the trial court stated that it was going to award sanctions. The judge explained, " I just don't like what I see here. [¶] . . . [¶] . . . This type of conduct is just not good. And I'm talking about generally the whole thing, reading through the stuff in this file and trying to get discovery accomplished. . . . Motion is granted." The court ordered the "entire amount" ($7,528.65) of monetary sanction to be paid by the University or its counsel.

Given the lack of transparency in Lavar's motion and the fact that it was filed after a payment check was sent, we must decide whether imposition of the sanction was unjust. (§§ 2025.430, 2023.030, subd. (a).) The University complains that instead of cashing the

check for $1,950 that its counsel mailed on June 24, 2016, Lavar "filed this motion instead, seeking almost $5,600 more" than the amount already covered by the check. The e-mail from the University's counsel stating that a reimbursement check would be mailed on June 24 could—and perhaps should—have averted the motion for sanctions. By that time, however, Lavar's counsel had already prepared the motion, consistent with his June 14 e-mail that asked the University to respond with payment, or an agreement to pay, by June 16. The decision to proceed with the motion cannot be deemed unreasonable given what had transpired and considering the statute provides for a mandatory monetary sanction. (§ 2025.430.) We also note that not all of the "$5,600 more" was due to the motion; part of that amount was incurred earlier but "waived" in Lavar's counsel's June 14 e-mail as an incentive for the University to promptly pay the $2,189.50.[8]

There is no question that the judge at the hearing was vocal in his disillusionment with the tenor of the litigation. Although we do not endorse the trial court's decision to truncate the argument opposing the sanctions motions, we perceive no legal error. The deposition's cancellation was subject to mandatory sanction under section 2025.430. Drawing all inferences in favor of the trial court's order (*Howell*, *supra*, 18 Cal.App.5th at p. 192), the evidence in the record supports a determination that the University's conduct was not substantially justified and that other circumstances do not render the sanction unjust. (§ 2025.430.) Applying the required standard of review, we conclude that the trial court did not abuse its discretion in awarding the monetary sanction.[9]

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[8] The June 14, 2016 e-mail from Lawrence to the University's counsel states, "we're currently willing to waive . . . approximately $1429.20 in compromise, if we don't have to go to court over whether we should be reimbursed fairly."

[9] No challenge is made to the amount of the sanction or specific attorney fees awarded. Accordingly, we need not consider whether the trial court should have exercised its discretion to reduce the fee award in a way that more closely reflected Lavar's "*reasonable* expenses, including attorney's fees, incurred . . . *as a result of*" the (continued)

B. SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE TRIAL COURT'S DECISION TO DENY THE PETITION TO COMPEL ARBITRATION

California's statutory scheme regulating private arbitration agreements is set forth in section 1280 et seq. "Through this detailed statutory scheme, the Legislature has expressed a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' " (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.)

Section 1281.2 governs the enforcement of contractual arbitration agreements: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement." (§ 1281.2, subds. (a), (b).)

The trial court in this case found the enrollment agreement executed by Lavar to be valid and enforceable but that the University had waived the right to compel arbitration. The only question presented on appeal is whether the court erred in its analysis of waiver under section 1281.2, subdivision (a).[10] An order denying a petition to compel arbitration is directly appealable. (§ 1294, subd. (a).)

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cancelled deposition. (§ 2023.030, subd. (a), italics added.) We nevertheless note that certain fees appear to relate to *preparation for* the deposition and did not *result from* its cancellation. (See *Howell*, *supra*, 18 Cal.App.5th at pp. 193-194 [upholding the award of monetary sanctions but finding the amount "unreasonable" because not all of the fees claimed were incurred *as a result of* the discovery abuses]; *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1564 [trial court must limit sanction award to costs " 'incurred' " as a result of discovery abuse and may not count costs of a *future* deposition that has not taken place].)

[10] Lavar has not challenged the trial court's predicate findings that (1) "there was a valid agreement to arbitrate executed by Plaintiff and that the agreement was not procedurally or substantively unconscionable," and (2) "Plaintiff's contentions, that she (continued)

1. Waiver of the Right to Arbitration and the Standard of Review

California law governing the contractual right to arbitration "reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims." (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) "While 'waiver' generally denotes the voluntary relinquishment of a known right, it can also refer to the loss of a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right. [Citations.] In the arbitration context, '[t]he term "waiver" has also been used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost.' " (*Id.* at p. 1195, fn. 4.)

We look to the California Supreme Court's most recent restatement of these principles in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*). " 'California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the "bad faith" or "willful misconduct" of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citation.]' [Citation.] The fact that the party petitioning for arbitration has participated in litigation, short of a determination on the merits, does not by itself constitute a waiver." (*Id.* at pp. 374-375).)

Factors relevant to the waiver inquiry include " ' " '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the

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did not read the arbitration clause of the agreement and that the agreement in its entirety is voidable, are not proper defenses to a petition for arbitration."

party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party.' " ' " (*Iskanian*, *supra*, 59 Cal.4th at p. 375, quoting *St. Agnes*, *supra*, 31 Cal.4th at p. 1196.)

Iskanian reinforced the concept that " 'prejudice . . . is critical in waiver determinations.' " (*Iskanian*, *supra*, 59 Cal.4th at pp. 376-377.) " '[B]ecause merely participating in litigation . . . does not result in . . . waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses.' " (*Id*. at p. 377.) Given California's " ' "strong public policy" ' " favoring arbitration " ' "as a speedy and relatively inexpensive means of dispute resolution" ' " (*St. Agnes*, *supra*, 31 Cal.4th at p. 1204), prejudice " 'typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration.' " (*Iskanian*, *supra*, at p. 377.) One pertinent example is " 'where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration . . . .' " (*Ibid*.)

The *Iskanian* court also articulated the standard of proof and standard of review. "In light of the policy in favor of arbitration, 'waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof.' [Citation.] 'Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] "When, however, the facts are undisputed and only one inference may reasonably be

drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling." ' " (*Iskanian*, *supra*, 59 Cal.4th at p. 375.)

2. *Substantial Evidence Supports the Trial Court's Determination that the University Waived its Right to Compel Arbitration*

This is not a case in which the facts "ineluctably lead to one conclusion on the issue of waiver." (*Bower v. Inter-Con Security Systems, Inc.* (2014) 232 Cal.App.4th 1035, 1043 (*Bower*).) The University contends that it acted consistently with the intent to arbitrate and did not take advantage of judicial discovery procedures, while Lavar frames the same conduct as evidence of bad faith and misconduct inconsistent with the University's claim to arbitration. Given the competing inferences that may be drawn from the record in this case, we review the trial court's ruling for substantial evidence. (*Ibid.* [independent review is appropriate only when the facts permit one reasonable inference]; *Iskanian*, *supra*, 59 Cal.4th at p. 375.) This requires us to indulge those inferences favorable to the trial court's judgment. (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211.) We bear in mind the need for "close judicial scrutiny" of the waiver claim, which may not be " ' "lightly inferred." ' " (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195.)

In its waiver ruling, the trial court found the University had "obtained substantial advantages" by not asserting the right to arbitrate "in the first instance" and having instead propounded interrogatories and obtained Lavar's lengthy deposition. The court noted that the University petitioned for arbitration after the original trial date which had been set for June 2016. It reasoned that "even assuming I were to adopt your assertion that there was no misuse of the discovery process and [the court] improvidently imposed the sanction award, there's sufficient other evidence to establish the waiver consistent with the sort of factual determinations made by the [Supreme] Court in the *Davis*" case.

Lavar touts the trial court's comparison of the University's conduct to that which amounted to waiver in *Davis*. We disagree that *Davis* is a suitable analogue and instead rely on the high court's more recent decisions in *Iskanian* and *St. Agnes*.

Davis involved consolidated class actions brought against the defendant Blue Cross by individual insureds who claimed that Blue Cross denied them hospitalization benefits. (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 421.) The trial court denied Blue Cross's petitions to compel arbitration, finding waiver, and the Supreme Court affirmed based upon the insurer's prelitigation conduct. (*Id*. at pp. 424-425.) It noted that Blue Cross frequently "failed to bring the arbitration procedure to its insureds' attention" (*id*. at p. 426) in what "amounted to an 'implied misrepresentation' " about their potential recourse. (*Ibid*.) In affirming the trial court, the high court emphasized "the special nature of the insurer-insured relationship" (*id*. at p. 427) and duty of the insurer to reasonably "inform an insured of the insured's rights and obligations under the insurance policy" (*id*. at p. 428). The court concluded that "[h]aving rejected plaintiffs' claims without . . . calling to their attention their potential remedy of arbitration and having thereby compelled plaintiffs to resort to litigation, Blue Cross is now hardly in a position to reverse itself and to invoke the arbitration process . . . ." (*Id*. at p. 431.)

Lavar contends that like the defendant in *Davis*, the University "had a duty to facilitate" her "student[] financial aid" but did nothing to inform her of arbitration when she first complained to the local district attorney's office. Lavar offers no authority for her contention that an academic institution has a duty to its students similar to that of an insurer to its insureds, and offers limited factual support for her claim that the University acted in bad faith by failing to alert her to arbitration earlier.[11] We therefore do not infer

[11] Lavar's declaration filed in support of her opposition to the petition for arbitration describes her unrequited efforts in 2013 to resolve her grievances with the (continued)

the sort of bad faith breach of duty that sustained the court's findings in *Davis*. To the extent the trial court found "evidence to establish the waiver consistent with the sort of factual determinations made . . . in the *Davis*" case, we conclude that finding is not supported by substantial evidence.

Whether the same may be said for the trial court's finding that the University gained "substantial advantages" by pursuing discovery and delaying the petition to compel arbitration until after the original, June 2016 trial date presents a closer question.

The University denies having obtained any advantages in discovery or otherwise. It attributes the delay in filing the petition for arbitration to Lavar's repeated postponements in responding to the arbitration demand and insistence that an amended complaint was forthcoming. It argues that it complied with the trial court's scheduling order in the filing of its petition, and that the discovery it conducted was neither inconsistent with the right to arbitrate nor unreasonable under the circumstances.

Lavar disputes that the University's conduct was reasonable or consistent with the right to arbitrate. She argues that the University's counsel promised her a jury trial as late as February 2016 and represented in ex parte proceedings to the trial court that it was prepared to proceed to trial in June 2016. She claims substantial prejudice from the University's litigation maneuvers, which she describes as withholding verifications and documents and filing the petition for arbitration and a stay close to the trial date, preventing her from taking depositions or effectively preparing for trial. She urges this court to allow the case to proceed in a public forum where the threat of sanctions and ultimately a public trial might help prevent further abuses by the University.

University but does not attach any supporting exhibits or documentation from that period. She also references a one-page excerpt from her deposition testimony, in which she states that the University misinformed her about scholarships.

We are persuaded by neither side's recitation of the record but ultimately conclude there is sufficient evidence to support the trial court's waiver finding, though on somewhat different grounds than those cited by the trial court.

We begin by focusing on the University's delay in asserting its right to arbitration and in filing the petition to compel. The University took affirmative steps to enforce its right to arbitrate starting in November 2015 when it produced a copy of the enrollment agreement to Lavar. This was about seven months after Lavar filed suit. During those first seven months, Lavar amended her initial complaint and retained an attorney. The University filed an answer (though without asserting its right to arbitration) and served two sets of form interrogatories, a request for statement of damages, and a request for production of documents.[12] The University also noticed Lavar's deposition for a date in September 2015 but cancelled it on short notice, fueling a discovery spat and an unrealized sanctions motion in December 2015. Lavar's counsel claims that he agreed in January 2016 to withdraw the sanctions motion to expedite discovery and a trial on the merits. Trial was set for June 2016.

Once the University informed Lavar in November 2015 of its intent to enforce the arbitration clause, its counsel contacted her counsel on numerous occasions about the demand.[13] These included written inquiries in January, February, and March 2016, which generated responses from Lavar's counsel such as "I look forward to letting you know, early next week, how my client wishes to proceed regarding the private arbitration clause

[12] The initial complaints and the University's answer are not in the record on appeal but are generally described in Lavar's declaration in opposition to the petition to compel. At the hearing, the trial court reviewed the "Answer that was filed to the Complaint in the Court's historical documents" and noted it did not find "the right to arbitrate" asserted as a defense to the complaint, though it "suppose[d]" that the asserted failure "to timely exhaust her internal administrative remedies . . . could be construed as the assertion of the failure to comply with the arbitration agreement."

[13] At least seven of these communications are summarized above (*ante*, part I.B.) and include multiple verbal and written requests for a response regarding arbitration.

and the amended complaint," and "[M]y client is about to go into surgery. In the next 2 to 3 weeks, after her surgery, I hope to review these matters with her." After withdrawing her February 2016 motion for leave to file a second amended complaint, Lavar refiled the motion in April 2016. The University did not oppose the proposal to amend the complaint but sought to preserve its right to petition to compel arbitration, which the trial court granted in conjunction with its order to vacate the June 2016 trial date and continue related discovery deadlines. The University filed the petition to compel arbitration on June 24, 2016, in compliance with the trial court's scheduling order.

The University took about seven months to assert a right to arbitration and an additional seven months to file its petition. The length of delay itself is not determinative. In *Iskanian*, our Supreme Court rejected the plaintiff's claim of waiver after the defendant renewed a petition to compel arbitration more than three years into litigation. (*Iskanian*, *supra*, 59 Cal.4th at pp. 376-378.) The court found that despite the plaintiff's "considerable effort and expense on discovery" over the three years (*id*. at p. 376), there was no waiver because the defendant's delay in seeking to enforce arbitration was not inconsistent with its right to arbitration. (*Id*. at p. 377.) The cause of delay in that case was a series of changes in precedential law for class actions, which led the defendant to abandon an initially-successful petition to compel arbitration, then to renew the petition three years later. (*Id*. at pp. 375-376.) Unlike cases in which "substantial expense and delay were caused by the *unreasonable* or *unjustified* conduct of the party seeking arbitration" (*id*. at p. 377), the court deemed the three-year-delay reasonable "in light of the state of the law at the time" and the plaintiff's "own opposition to arbitration" (*ibid*.).

In *Khalatian v. Prime Time Shuttle, Inc*. (2015) 237 Cal.App.4th 651 (*Khalatian*), the Court of Appeal applied the same rubric in concluding that a 14-month delay in the defendants' filing of the petition to compel arbitration was insufficient to support the trial

court's waiver finding. (*Id*. at p. 663.) The court found that the plaintiff could not demonstrate prejudice from the delay, which under *Iskanian* was "determinative." (*Id*. at p. 654.) It noted that during the 14-month delay, only one defendant propounded a set of interrogatories and request for production; there were no depositions taken or discovery motions filed; the defendants agreed that the plaintiff could file an amended complaint, so their demurrer was taken off calendar; and the "trial date was more than a year away" when the defendants filed their petition for arbitration. (*Id*. at p. 662.) The court concluded there was insufficient evidence to support the waiver claim, having found "no evidence" that the defendants had "stretched out the litigation process, gained information about [the] plaintiff's case they could not have learned in an arbitration, or waited until the eve of trial to move to compel arbitration." (*Id*. at p. 663.)

Another example is *Gloster v. Sonic Automotive, Inc*. (2014) 226 Cal.App.4th 438, 441 (*Gloster*). As in *Khalatian*, the appellate court found the extended delay in the defendants' filing of their petition for arbitration was not sufficient to support a waiver finding, as the delay was not unreasonable or prejudicial. (*Id*. at p. 449.) The court noted that the defendants consistently asserted their right to arbitration, including by "pleading an appropriate affirmative defense" and by stating "their intent to seek arbitration in a series of case management statements." (*Ibid*.) Though they deferred filing the petition for arbitration while awaiting a demurrer filed by a codefendant, they in the meantime "filed no motions or discovery requests of their own, restricting their litigation activity to responding to [the plaintiff]'s requests and attending case management conferences." (*Ibid*.) Finding the defendants did not try "to obtain an advantageous litigation position during the delay" (*ibid*.), the court concluded that the plaintiff had failed to show cognizable prejudice from the delay. (*Id*. at p. 450.)

The University argues that under *Iskanian*, *supra*, 59 Cal.4th at page 376, it acted reasonably by trying to accommodate Lavar who, for medical and other reasons, took months to consider the arbitration demand and to file for leave to amend her complaint.

We recognize that Lavar's reticence to state a position on arbitration and her delay in seeking leave to amend undeniably influenced the University's timing. But we cannot agree that the University restricted its litigation activities in a manner consistent with the intent to arbitrate.

First, we find " ' " ' "the litigation machinery ha[d] been substantially invoked" ' " ' " (*Iskanian*, *supra*, 59 Cal.4th at p. 375) months before the University produced the enrollment agreement and stated an intent to arbitrate. The University answered Lavar's in propria persona complaint without asserting the arbitration clause in an affirmative defense, and served form interrogatories, document requests, and the notice of deposition—actions that unequivocally signal litigation. Lavar, in turn, retained trial counsel, who claims the University rebuffed numerous attempts to obtain reciprocal discovery and withheld verifications to its discovery responses. By comparison, in *Iskanian*, the defendants responded to the lawsuit by filing an initial petition to compel arbitration, and in *Gloster*, the defendants asserted their right to arbitration at the start of litigation, both in communications with opposing counsel and in the filing of affirmative defenses. (*Iskanian*, *supra*, at p. 375; *Gloster*, *supra*, 226 Cal.App.4th at p. 449.)

Second, the University took " ' " ' "important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] . . ." . . .' " ' " (*Iskanian*, *supra*, 59 Cal.4th at p. 375) even after it asserted its right to arbitration and began trying to obtain Lavar's consent to arbitrate. That is, the University maintained its litigation stance and took advantage of judicial discovery procedures until the filing of the petition to compel arbitration. The most prominent example is the University's deposition of Lavar in February 2016 and effort to continue the deposition in May 2016.

The University contends that the February 2016 deposition was necessary "to preserve its right to take Plaintiff's deposition before the possible June trial." It states that at the time, it did not know whether the case would go to trial in June 2016, and Lavar had not responded to its arbitration overtures and was going to be unavailable due

to medical surgery. In an earlier declaration to the trial court, the University's counsel explained that the University took Lavar's deposition in February 2016 when she "had not yet decided whether to agree to the University's demand for arbitration." When it "became apparent" at the deposition that Lavar "had not produced all of the documents" requested in conjunction with the notice of deposition and request for production, the University obtained Lavar's consent to complete the deposition later. The "later date" became the June 8 deposition that the University cancelled, leading to the sanctions award.

Of course, "[a]nswering a complaint and participating in litigation, on their own, do not waive the right to arbitrate." (*Gloster, supra,* 226 Cal.App.4th at p. 449.) But such active measures undercut the University's claim that it propounded only limited discovery and stand in contrast with the cases above. Whereas the delay in filing the petition for arbitration in *Gloster* did not support waiver in part because the parties seeking arbitration "restrict[ed] their litigation activity" during the delay period "to responding to [the plaintiff]'s requests and attending case management conferences" (*ibid*.; see also *Khalatian, supra,* 237 Cal.App.4th at p. 662 [noting only one among several defendants propounded a single set of interrogatories and document requests, and none took depositions]), the University doggedly pursued Lavar's deposition in the face of a trial date.

The University's own explanation for its last-minute withdrawal from the continued deposition and refusal to accept Lavar's further production of documents highlights the inconsistency between its discovery stance and its claim to the right to arbitration. It claims, "[t]he University acted with substantial justification and in good faith when it made the decision to not proceed with the deposition, because *doing so would be contrary to the forthcoming petition for arbitration and stay*." (Italics added.)

We are also not persuaded that the University's tactics qualify as preserving some right that would otherwise be lost. That language comes from *Bower*, a class action in

which the trial court found that the defendant had waived the right to compel arbitration by engaging in litigation inconsistent with its arbitration demand. (*Bower*, *supra*, 232 Cal.App.4th at p. 1038.) The appellate court affirmed the waiver finding. (*Id.* at p. 1043.) It noted that at the outset of the litigation, the defendant asserted its right to arbitrate the plaintiff's individual claims, though not the class claims. (*Id.* at pp. 1043-1044.) Even so, the defendant propounded classwide discovery. (*Ibid.*) The appellate court rejected this approach because "the classwide discovery at issue was initiated by [the defendant], was not de minimis, and *was not propounded to preserve some right to seek discovery that would otherwise be lost*." (*Id.* at p. 1045, italics added.) The court explained that seeking classwide discovery in litigation was "fundamentally inconsistent" with the defendant's claim that any arbitration would be limited to the plaintiff's individual claims. (*Id.* at p. 1044.) Although the arbitration agreement permitted the parties to conduct "reasonable discovery" under the Federal Rules of Civil Procedure, "there is nothing in the arbitration agreement to suggest the parties had any right to discovery of matters beyond the scope of the arbitration." (*Ibid.*)

The University's leverage of the judicial discovery process to obtain Lavar's deposition testimony in this case is comparable to the defendant's classwide discovery in *Bower*, because the discovery sought in litigation was not available under the arbitration agreement. This is closely related to the question of prejudice. " 'Prejudice typically is found only where the petitioning party's conduct has . . . substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration' " (*Iskanian*, *supra*, 59 Cal.4th at p. 377), including for example " 'where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration . . . .' " (*Ibid.*) Given this concept of prejudice, we find it significant that the discovery sought by the defendant in *Bower* was inconsistent with the right to arbitrate because it went "beyond the scope" of discovery allowed under the arbitration agreement. (*Bower*, *supra*, 232 Cal.App.4th at p. 1044.)

Other cases have drawn similar distinctions. The Supreme Court in *Iskanian* rejected the class plaintiff's waiver argument in part "[b]ecause the arbitration agreement itself provides for 'reasonable discovery,' [so] there is no indication that [the defendant] obtained any material information through pretrial discovery that it could not have obtained through arbitral discovery." (*Iskanian*, *supra*, 59 Cal.4th at p. 378.) A recent decision of the Second District upheld the trial court's finding that the defendant did *not* waive his right to arbitrate, noting in part that the defendant's engagement in discovery was consistent with the discovery provisions in the arbitration agreement. (*Cox v. Bonni* (2018) 30 Cal.App.5th 287, 304-305 (*Cox*).) Contrary to the plaintiff's claim that the defendant took advantage of discovery procedures not available in arbitration, the court in *Cox* found that the arbitration agreements invoked the arbitral discovery provisions of section 1283.05[14] and "expressly granted the parties the same ability to obtain discovery that they would have in the trial court." (*Cox*, *supra*, at p. 304.) The court concluded that the plaintiff failed to demonstrate prejudice, apart from " 'merely participating' " in the litigation. (*Cox*, *supra*, at p. 304.)

Our case is factually similar to *Cox* in terms of both the discovery propounded by the defendant and the plaintiff's failure to respond to the defendant's arbitration demands, which likely added to the delay in filing the petition to compel arbitration. (See *Cox*, *supra*, 30 Cal.App.5th at pp. 303-304.) The distinguishing factor, however, is that the deposition notices and discovery requests served by the defendant in *Cox* were not

[14] Section 1283.05 authorizes parties to arbitration the "right to take depositions and to obtain discovery" in the same manner as a civil action and authorizes the arbitrator to enforce the rights of discovery (§ 1283.05, subds. (a), (b)-(c)), subject to limitations including that "[d]epositions for discovery shall not be taken unless leave to do so is first granted by the arbitrator or arbitrators." (§ 1283.05, subd. (e).) The provisions of section 1283.05 apply to arbitration proceedings automatically if the arbitration arises out a claim for wrongful death or for personal injury (§ 1283.1, subd. (a)), or "[o]nly if the parties by their agreement so provide . . . ." (§ 1283.1, subd. (b).)

outside the scope of discovery under the arbitration provisions, so the determination that the plaintiff failed to make the "requisite showing of prejudice" was well-supported by the evidence in the record. (*Id*. at p. 305.) Here, the arbitration agreement does not invoke section 1283.05 or even reference discovery. It simply provides for arbitration "in accordance with the laws of the State of California . . . ."[15]

Because "[d]iscovery in arbitration is generally limited" (*Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.* (2008) 44 Cal.4th 528, 534), and the statutory provisions authorizing depositions and written discovery are only incorporated into an arbitration agreement "if the parties by their agreement so provide" (§ 1283.1, subd. (b)), we find the general reference to California law insufficient to grant Lavar "the same ability to obtain discovery" that she would have in the trial court. (Cf. *Cox*, *supra*, 30 Cal.App.5th at p. 304.) As the California Supreme Court has explained, "[p]arties to arbitration agreements are free to incorporate discovery procedures if they choose to do so but, except in the case of personal injury and wrongful death claims [citation], their failure to do so is taken as an agreement to operate without such procedures." (*Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 783, fn. 1, citing § 1283.1, subd. (b).) Mutuality in obtaining deposition or other discovery in arbitration in this case would therefore depend upon the parties reaching an agreement.[16]

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[15] The agreement states in part, "Any controversy or claim arising out of or relating to this agreement . . . shall be submitted exclusively to final and binding arbitration in accordance with the laws of the State of California upon a claim submitted in writing to the other Party to this agreement . . . . A neutral arbitrator shall be jointly chosen by both parties from a list of arbitrators supplied by the American Arbitration Association or from any other source mutually agreed upon by the parties. . . . The duly rendered decision of an arbitrator, including determination of the amount of damages suffered, shall be exclusive, final and binding on both parties."

[16] To its credit, the University has stated on the record that it would make its PMQ available for deposition.

In sum, having demanded arbitration to no effect for several months, the University was faced with an impending trial date. Even though the arbitration agreement did not provide for discovery or for party depositions, the University proceeded with Lavar's deposition for what she asserts was 14 hours over two days. Unsatisfied with Lavar's production of documents at her deposition, the University then obtained her agreement to continue the deposition at a later date, which it vigorously pursued until realizing at the last moment that—in the University's own words—*doing so would be contrary to the forthcoming petition for arbitration and stay*.

Drawing, as we must, all reasonable inferences about the discovery conduct and available discovery favorable to the trial court's order (*Bower*, *supra*, 232 Cal.App.4th at p. 1043), we find that substantial evidence supports the trial court's waiver finding. The impending trial deadline and lack of provision for discovery under the arbitration agreement made the University's decision to proceed with Lavar's deposition in February 2016 both inconsistent with the right to arbitrate and advantageous under judicial discovery procedures not available in arbitration. (*Iskanian*, *supra*, 59 Cal.4th at p. 375; *St. Agnes*, *supra*, 31 Cal.4th at p. 1196.)

Under these circumstances, we cannot agree with the University that nothing in the record shows it gained any substantial advantage. The University's comparison to the Supreme Court's prejudice analysis in *St. Agnes* is unavailing. In that case, the court rejected the waiver claim on the grounds "that the parties [had not] litigated the merits or the substance" of the arbitrable claims, no "discovery of those claims has occurred," and there was no indication that the party seeking arbitration had "used the [other] actions to gain information about [the] case that otherwise would be unavailable in arbitration." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1204.) Here, discovery of Lavar's arbitrable claims *has* occurred to a substantial degree based on Lavar's deposition, while like efforts by Lavar have gone unanswered. It is unclear how this imbalance would be rectified in arbitration. Furthermore, to the extent the University failed to justify the initial period of

delay before it even asserted the right to arbitration, consideration of Lavar's costs and expenses incurred during that period is appropriate. (*Iskanian*, *supra*, 59 Cal.4th at p. 377 [courts may consider when "substantial expense and delay . . . caused by the *unreasonable* or *unjustified* conduct of the party seeking arbitration"].)

III. DISPOSITION

The order granting Lavar's motion for monetary sanction is affirmed.

The order denying the University's petition for an order to arbitrate and for stay of action pending arbitration is affirmed.

Greenwood, P.J.

WE CONCUR:

Grover, J.

Danner, J.

Vandeleur Leigh v. Stephens Institute, Inc.
H043942